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Sunnyside Coal Company v. Utah Labor Commission : Brief of Appellant

Utah Supreme Court

IN THE UTAH SUPREME COURT

SUNNYSIDE COAL COMPANY/ WORKERS COMPENSATION FUND; and EMPLOYERS' REINSURANCE FUND, Appellants/Petitioners, v. UTAH LABOR COMMISSION; and CECIL HENNINGSON, Appellees/Respondents.	Appellate Case No. 20110033-CA Labor Commission Case No. 07-0253

REPLACEMENT BRIEF OF APPELLANT EMPLOYERS' REINSURANCE FUND

APPEAL FROM THE ORDER OF THE UTAH LABOR COMMISSION

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Appellant/Petitioner Employers' Reinsurance Fund ("ERF") respectfully submits this Replacement Brief pursuant to the Court's Order dated February 23, 2012. ERF has elected to file a Replacement Brief because the arguments submitted below assumed that the Court of Appeals was bound by the plurality opinion in *Vigos v. Mountainland Builders, Inc.*, 2000 UT 2, 993 P.2d 207. ERF invites this Court to reexamine the holding of *Vigos* in light of the facts presented by this case.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Utah Code Annotated section 78A-3-102(3)(b) (2011).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Issue: Whether the Utah Labor Commission (the "Labor Commission") erred by holding that the six year statute of limitations did not bar Cecil Henningson's claim for permanent total disability benefits where: (a) Mr. Henningson's claim for permanent total disability benefits fully accrued in 1993 following his industrial accident; (b) Mr. Henningson knew no later than 1994 that he was permanently and totally disabled as a result of his injury; (c) Mr. Henningson made no efforts to rehabilitate himself and did not seek employment after his injury; and (d) ERF received no notice of Mr. Henningson's claim until 2007 when Mr. Henningson first applied for an award of permanent total disability benefits.

Standard of Review and Preservation: There are no disputed facts so this issue presents a question of law which is reviewed under a correction of error standard, giving no deference to the Labor Commission's determination. *See Dean Evans Chrysler*

Plymouth v. Morse, 692 P.2d 779, 782 (Utah 1984); *Burgess v. Siaperas Sand & Gravel*, 965 P.2d 583, 585 (Utah Ct. App. 1998). This issue was preserved below by motion (R. at 136-37, 174-206) and during argument (R. at 338, pp. 17:7-19:2, 69:9-76:20).

2. Issue: Whether the Labor Commission erred by holding that it had continuing jurisdiction over Mr. Henningson's permanent total disability claim pursuant to Utah Code Annotated section 35-1-78 (1993), where: (a) Mr. Henningson did not seek permanent total disability compensation within the limitations period; (b) Mr. Henningson demonstrated no increase in the 22% permanent partial impairment that was rated and fully paid shortly after his 1993 accident; and (c) the Labor Commission took no action to assert jurisdiction with respect to ERF during the limitations period.

Standard of Review and Preservation: This issue presents a question of law which is reviewed under a correction of error standard, giving no deference to the Labor Commission's determination. *See Mendoza v. Labor Comm'n*, 2007 UT App 186, ¶ 5, 164 P.3d 447. This issue was preserved below by motion (R. at 136-37, 174-206) and during argument (R. at 338, pp. 17:7-19:2, 69:9-76:20).

3. Issue: Whether the Labor Commission and ALJ erred by failing to address (and implicitly rejecting) ERF's argument that equitable principles of waiver and laches bar Mr. Henningson's claim for permanent total disability benefits, where ERF demonstrated prejudice as a result of Mr. Henningson's nearly fourteen year delay in filing his claim.

Standard of Review and Preservation: Whether an agency has decided all issues requiring resolution is a question of law reviewed for correctness. *Orchard Park*

Care Ctr. v. Dep't of Health, 2009 UT App 284, ¶ 8, 222 P.3d 64. This issue was preserved below during argument (R. at 338, pp. 17:7-19:2, 69:9-76:20).

STATUTES OF CENTRAL IMPORTANCE

Two statutes, Utah Code Annotated section 35-1-98(2) (1993) and Utah Code Annotated section 35-1-78 (1993) are of central importance to this appeal.[1] The first, a statute of limitations, provides:

> A claim for compensation for temporary total disability benefits, temporary partial disability benefits, permanent partial disability benefits, or permanent total disability benefits is barred, unless an application for hearing is filed with the commission within six years after the date of the accident.

Utah Code Ann. § 35-1-98(2) (1993). The next, a statute conferring continuing jurisdiction over cases filed with the then-Industrial Commission and an included caution that continuing jurisdiction may not be utilized to modify or change the statutes of limitations, reads:

> (1) The powers and jurisdiction of the commission over each case shall be continuing. The commission, after notice and hearing, may from time to time modify or change its former findings and orders. Records pertaining to cases that have been closed and inactive for ten years, other than cases of total permanent disability or cases in which a claim has been filed as in Section 35-1-98, may be destroyed at the discretion of the commission.
> . . . .
> (3)(a) This section may not be interpreted as modifying in any respect the statutes of limitations contained in other sections of this chapter or Title 35, Chapter 2, the Utah Occupational Disease Disability Law.
> (b) The commission has no power to change the statutes of limitation referred to in Subsection (a) in any respect.

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[1] The statutes in effect in 1993 are cited herein because "[i]n workers' compensation cases, we generally apply the law existing at the time of injury." *Wicat Sys. v. Pellegrini*, 771 P.2d 686, 687 (Utah Ct. App. 1989).

Utah Code Ann. § 35-1-78 (1993). Copies of these authorities are included in the Addendum to this Replacement Brief.

STATEMENT OF THE CASE

I. Nature of the Case

This is an appeal of an award of permanent total disability benefits to a worker who believed he was disabled shortly after a 1993 accident while working for Sunnyside Coal Company ("Sunnyside"), but waited some fourteen years before he filed an application seeking permanent total disability benefits. This 2007 application was ERF's first notice of Mr. Henningson's accident or of his claim of permanent total disability. ERF, Sunnyside, and Sunnyside's insurer, Workers Compensation Fund ("WCF"), raised the six-year statute of limitations found in Utah Code Annotated Section 35-1-98(2) (1993) as a defense to the 2007 filing. ERF also noted the prejudice caused to ERF by the late filing, in that it was unable to investigate the claim in the period following the accident and was deprived of any meaningful opportunity to pursue its statutory right to attempt to rehabilitate Mr. Henningson.

The Labor Commission awarded benefits, finding that the statute of limitations did not apply because the accident was timely reported and because Sunnyside and WCF had paid temporary total disability and permanent partial disability benefits to Mr. Henningson. Those payments were completed in 1995. The Labor Commission based its

conclusion that the six-year statute of limitations did not apply on its reading of *Vigos v. Mountainland Builders, Inc.*, 2000 UT 2, 993 P.2d 207.[2]

The Labor Commission also held that it had continuing jurisdiction to order ERF to pay permanent total disability benefits to Mr. Henningson, even though ERF was not a party to the permanent partial disability claim and there was no medical evidence of a substantial change in Mr. Henningson's impairment. ERF is never responsible for payment of permanent partial disability benefits for accidents that occurred in the 1990's, so it is never made a party to such claims. In particular, ERF had no notice of Mr. Henningson's permanent partial disability claim or his medical condition before his 2007 application for permanent total disability benefits. The Labor Commission nevertheless found that Mr. Henningson has been permanently totally disabled since his October 1993 accident, directed Sunnyside and WCF to pay the balance of their statutory obligation for such benefits, and ordered ERF to assume responsibility for payment of lifetime benefits thereafter.[3]

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[2] The Labor Commission has consistently read *Vigos* as having eliminated consideration of the statute of limitations in all permanent total disability cases where an injury was duly reported, regardless of the severity of the injury, which parties were notified of the injury, and when permanent total disability benefits were first requested. Because all industrial injuries are required by other statutes to be reported when they occur, this interpretation of *Vigos* effectively reads the statute of limitations out of the Utah Code. Counsel for ERF is unaware of any instance since *Vigos* where the Labor Commission has denied a permanent total disability claim based on the statute of limitations.

[3] In this case, ERF's obligation for payment of permanent total disability benefits to Mr. Henningson, made retroactive to 1993 and coupled with now-generous 8% statutory rate of interest, exceeds $500,000.

II. Course of Proceedings and Disposition Below

Mr. Henningson filed an Amended Application for Hearing with the Labor Commission on April 16, 2007, seeking for the first time an award of permanent total disability benefits for a back injury he suffered on October 13, 1993, while working for Sunnyside. (R. at 25.)[4] WCF had previously paid Mr. Henningson temporary total disability and permanent partial disability compensation through June 8, 1995. (R. at 42.) ERF received no notice of Mr. Henningson's accident or of his prior claim for permanent partial disability benefits until he filed his application in 2007, nearly fourteen years after his accident.

On July 3, 2007, WCF filed a Motion for Summary Judgment, arguing that Mr. Henningson's claim was barred by the six-year statute of limitations found in Utah Code Annotated section 35-1-98 (1993). (R. at 39-83.) WCF also argued that the Labor Commission should not exercise continuing jurisdiction over Mr. Henningson's claim because there was no proof that his circumstances had changed since the time of his injury nor was there proof of the prior permanent partial disability award's inadequacy. (R. at 39-83.) ERF joined in WCF's motion. (R. at 136-37.)

Administrative Law Judge Debbie L. Hann (the "ALJ") denied WCF's and ERF's motions in an Order dated August 15, 2007. (R. at 131-35.) A hearing was held on Mr. Henningson's claim on August 20, 2007. (R. at 338.) Mr. Henningson testified at

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[4] Mr. Henningson's original Application for Hearing, which was filed on February 22, 2007, referenced a back injury suffered by Mr. Henningson on September 3, 1993. (R. at 1.) The parties proceeded below, however, under the Amended Application for Hearing and considered October 13, 1993, as the date of injury. (*See, e.g.*, R. at 30, 167.)

the hearing that he had not returned to work following his October 1993 injury and admitted that he had not attempted to find work since that time. (R. 338, p. 38:6-18 (Transcript of Hearing).) A Medical Records Exhibit was also introduced at the hearing. (R. at 337.) Included in the Medical Records Exhibit were reports from Mr. Henningson's physicians stating that he has been disabled and unable to work since 1993. (R. at 337, pp. 32-33, 88A.) ERF renewed its motion at the hearing, arguing that Mr. Henningson's claim is barred by the statute of limitations, and that principles of equity and fairness likewise preclude his claim. (R. at 338, pp. 72:10-16.)

The ALJ issued Findings of Fact, Conclusions of Law, and Order on November 15, 2007, awarding permanent total disability benefits to Mr. Henningson, payable back to the date of his disability, even though the respondents had no notice of or opportunity to adjust or reserve for a permanent total disability claim during that time period. (R. at 166-73 (a copy of which is attached as Addendum C).) The ALJ ruled that the six-year statute of limitations specified in section 35-1-98 was satisfied because Mr. Henningson received permanent partial disability benefits from WCF following his 1993 accident. (R. at 168-70.) ERF was presumed by the ALJ to be on notice of Mr. Henningson's unfiled claim. (*See* R. at 168-70.)

On December 5, 2007, ERF filed a Motion for Review with the Utah Labor Commission, renewing its argument that Mr. Henningson's claim was barred in its entirety by the six-year statute of limitations because he knew all of the facts supporting his permanent total disability claim shortly after his accident and yet waited fourteen years to file an application with the Labor Commission seeking such benefits. (R. at 174-

206.) ERF also argued that the Labor Commission's continuing jurisdiction did not justify an award of permanent total disability benefits because Mr. Henningson had not demonstrated a change in his medical condition and he had been paid in full for his rated impairment. (R. at 179-81.) WCF filed a Motion for Review on similar bases on December 13, 2007. (R. at 207-313.)

On December 27, 2010, the Labor Commission denied ERF's and WCF's motions in an Order on Motion for Review. (R. at 330-36 (a copy of which is attached as Addendum D).) The Labor Commission held that Mr. Henningson's claim satisfied the limitations period in Utah Code Annotated section 35-1-98 (1993) because Sunnyside and WCF paid temporary total and permanent partial disability benefits to Mr. Henningson following his injury. (R. at 332.) ERF was again deemed to be on notice of Mr. Henningson's unfiled permanent total disability claim. (*See* R. at 332.) The Labor Commission also determined that it had continuing jurisdiction over Mr. Henningson's claim because Mr. Henningson "never received the permanent total disability compensation to which he was entitled." (R. at 333.)

ERF appealed the Labor Commission's decision by filing a Petition for Review with the Utah Court of Appeals on January 13, 2011. WCF also filed Petition for Review on or about January 19, 2011. The cases were consolidated on or about January 26, 2011. After briefing their arguments to the Court of Appeals, the parties presented oral argument on February 16, 2012. By Order dated February 17, 2012, the Court of Appeals certified the case to this Court.

III. Statement of Facts

1. Mr. Henningson was injured in an industrial accident on or about October 13, 1993, during the course of his employment with Sunnyside. (R. at 167).

2. Mr. Henningson had suffered previous industrial injuries to his back,[5] resulting in two prior back surgeries. (R. at 167.)

3. Mr. Henningson underwent a third back surgery in January 1994. (R. at 337, p. 110-111 (Medical Records Exhibit).)

4. WCF paid Mr. Henningson temporary total disability compensation benefits between October 14, 1993, and December 15, 1994. (R. at 42.) WCF paid Mr. Henningson permanent partial disability compensation benefits between December 16, 1994, and June 8, 1995. (R. at 42.) The total permanent partial impairment rating for Mr. Henningson's combined accidents was 22%, all of which was compensated at the rate provided by law. (R. at 331.) WCF also paid certain medical expenses on behalf of Mr. Henningson. (R. at 42.)

5. Mr. Henningson filed for Social Security disability benefits in May 1994, affirmatively alleging to the Social Security Administration that he was permanently and totally disabled as a result of the injury he sustained on October 13, 1993. (R. at 5.)

6. On April 28, 1995, the Social Security Administration determined that Mr. Henningson had been totally disabled since the October 13, 1993, industrial accident and awarded Mr. Henningson total disability compensation dating back to the day after his industrial accident. (R. at 5-8.)

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[5] *See supra* note 4.

7. Mr. Henningson was told by physicians within the limitations period that he was totally disabled. In a report dated February 26, 1997, Dr. Alan L. Colledge stated that Mr. Henningson "has been declared unable to return to work, now being totally and permanently disabled." (R. at 10.)

8. Dr. Colledge also completed an insurance form on behalf of Mr. Henningson in 1997, stating that Mr. Henningson was permanently disabled and had been medically unable to work since 1993. (R. at 9.)

9. In August 2007, Dr. David R. Heiner recorded that Mr. Henningson has been disabled since his 1993 industrial accident and subsequent surgery. (R. at 337, p. 88A.)

10. Mr. Henningson has undergone numerous reviews by the Social Security Administration of his health and condition. (R. at 338, p. 31:1-3.) No medical documentation was offered to demonstrate that Mr. Henningson's medical condition had changed since he filed his application for disability benefits with the Social Security Administration and affirmed that he was permanently and totally disabled.

11. Mr. Henningson acknowledged that he never returned to work and did not even attempt to find work following his October 1993 industrial accident. (R. at 60-62, 66, 167, 338, p. 38:6-18.)

12. Mr. Henningson's original Application for Hearing seeking permanent total disability compensation, filed February 22, 2007, was the first notice ERF received regarding any claim by Mr. Henningson for benefits due to the 1993 industrial injury. (*See* R. at 177.)

13. Because of Mr. Henningson's delay in filing his claim for permanent total disability benefits, ERF had no opportunity to timely investigate or defend the claim, could not adjust accounts or reserve funds for potential future liability, and lost any meaningful opportunity to rehabilitate Mr. Henningson. (*See* R. at 177-78.)

SUMMARY OF ARGUMENT

Mr. Henningson's claim should be barred by the six-year statute of limitations. The Labor Commission clearly felt constrained to award benefits based on its reading of *Vigos v. Mountainland Builders, Inc.*, 2000 UT 2, 993 P.2d 207, and the Court's understandable reluctance in that case to deny benefits to a worker who tried to return to work and rehabilitate himself, only to be told at the end of the six-year limitations period that he was totally disabled. Unfortunately, the holding reached under the difficult, unusual facts of *Vigos* has since been applied as if it were a repeal of the statute of limitations in all permanent total disability cases where an accident was duly reported or benefits of any nature were paid. *Vigos* should not stand for the proposition that a worker may delay the filing of a ripe, known claim otherwise barred by the statute of limitations. To the extent *Vigos* may be so read, it should be limited to its facts or otherwise construed to effectuate the legislature's intent in enacting a statute of limitations.

The facts in this case are much different than those of *Vigos*. Mr. Henningson was injured in 1993 in an industrial accident. His injury and resulting permanent partial impairment were promptly and fully paid by Sunnyside and WCF. Within a year of his accident, Mr. Henningson came to believe that he was totally disabled and sought

benefits from the Social Security Administration, specifically affirming to that agency that he was totally disabled. Mr. Henningson's doctors also offered contemporaneous opinions to him that he was permanently and totally disabled and could not return to work. Mr. Henningson did not attempt to find work after his accident.

Mr. Henningson did not assert a claim for permanent total disability compensation under the Utah workers compensation statutes until he filed an Application for Hearing with the Labor Commission in 2007. That filing was the first notice to Sunnyside and WCF that Mr. Henningson believed he was entitled to permanent total disability benefits, and it was the first notice of any kind to ERF that he had been involved in an accident nearly fourteen years earlier. The Labor Commission determined that the statute of limitations found in Utah Code Ann. § 35-1-98 (1993) did not bar Mr. Henningson's late claim based on its reading of this Court's plurality decision in *Vigos v. Mountainland Builders*, 2000 UT 2, 993 P.2d 207, and on Utah Code Ann. § 35-1-78 (1993).

Vigos should not apply to the facts of this case. While in *Vigos*, the petitioner's total disability status was unclear to him and others until the end of the limitations period, Mr. Henningson was advised and believed he disabled within a year or so of his accident. Unlike the petitioner in *Vigos,* Mr. Henningson never tried to rehabilitate himself and did not seek work again following his accident. And here, unlike the respondents in *Vigos*, ERF received no notice of Mr. Henningson's prior permanent partial disability claim, did not accept liability for benefits and did not concede jurisdiction over the claim within the limitations period. Because of the prejudice to ERF from the late filing, Mr. Henningson's claim should also be barred by the doctrines of waiver and laches.

The Labor Commission also erred by concluding that the continuing jurisdiction provided by Utah Code Section 35-1-78 (1993) enabled it to order ERF to pay lifetime permanent disability total benefits to Mr. Henningson. The Labor Commission's decision was premised on the incorrect assumption that it had obtained jurisdiction over ERF within the limitations period. That was not the case. Mr. Henningson did not file a timely application for hearing against ERF. Moreover, the attempted exercise of continuing jurisdiction in this case runs directly contrary to that statute's plain prohibition against using continuing jurisdiction "in any respect" to modify or change applicable statutes of limitation. Utah Code Ann. § 35-1-78 (1993).

Further, even if the Labor Commission had timely obtained jurisdiction over ERF with respect to this claim, there was no basis here for the Labor Commission to assert continuing jurisdiction. Exercise of the Labor Commission's continuing jurisdiction requires as a predicate that a claimant show a substantial change in his health or circumstances or the inadequacy of a prior award. Mr. Henningson failed to present any medical evidence to show that his impairment level had changed between 1993 and 2007. Neither did he demonstrate that the previous permanent partial disability award was inadequate. The medical records show no greater impairment than the 22% whole man impairment for which he was already compensated.

ARGUMENT

I. MR. HENNINGSON KNEW HE WAS PERMANENTLY AND TOTALLY DISABLED WITHIN THE LIMITATIONS PERIOD

Mr. Henningson suffered an unfortunate industrial injury in October 1993. Shortly after his accident he knew all of the facts now urged to support his claim for permanent and total disability benefits. As early as 1994, Mr. Henningson affirmatively represented to the Social Security Administration that he was permanently and totally disabled. Indeed, he affirmatively alleged in his 1994 application for Social Security disability benefits that he was permanently and totally disabled as a result of the October 1993 injury. The Social Security Administration agreed that Mr. Henningson was disabled and awarded him disability compensation beginning the day after his injury.

Though ERF had no opportunity to investigate the accident or evaluate his condition, the medical records currently available indicate that Mr. Henningson's disability status was immediately apparent following his October 1993 accident. His 22% impairment rating has not changed since he recovered from surgery following the accident. Since then, his doctors have consistently reported that Mr. Henningson was rendered permanently and totally disabled as a result of the October 1993 accident. In 1997, Dr. Colledge stated on two occasions that Mr. Henningson's 1993 accident left him permanently and totally disabled. Dr. Heiner issued the same opinion in 2007. The Social Security Administration has conducted regular reviews of Mr. Henningson's disability status since his award of permanent total disability benefits.

Mr. Henningson was unable to return to work immediately following his accident. He did not return to work thereafter and did not attempt to rehabilitate himself. Neither did he attempt to find work. His conduct has been consistent with his 1994 claim to the Social Security Administration that he was permanently and totally disabled, and with his continuing acceptance of disability benefits based on that representation.

Utah Code Annotated section 35-1-98(2) (1993), which was in effect in October 1993 at the time of Mr. Henningson's injury, provides that:

> A claim for compensation for temporary total disability benefits, temporary partial disability benefits, permanent partial disability benefits, or permanent total disability benefits is barred, unless an application for hearing is filed with the commission within six years after the date of the accident.

Mr. Henningson's measured 22% impairment and his employment status have not changed since October 1993. There can be no dispute that Mr. Henningson knew he was permanently and totally disabled within the six year statute of limitations period. Mr. Henningson knew all of the facts supporting to his present claim for permanent total disability benefits shortly after his accident, yet he waited until 2007 to file an application seeking such benefits. By its plain terms, this statute completely bars Mr. Henningson's permanent total disability claim ERF. Only the holding of *Vigos* supports a different result.

II. ERF WAS NOT AWARE OF MR. HENNINGSON'S CLAIM UNTIL 2007

Though he knew he was permanently and totally disabled as a result of his 1993 accident, Mr. Henningson waited until 2007 to file a claim seeking lifetime permanent

total disability benefits under Utah law. The 2007 Amended Application for Hearing was the first notice ERF received of Mr. Henningson's claim.

ERF has no responsibility at all for payment of permanent partial disability benefits arising out of accidents that occurred in the 1990's, so it is never joined as a party to claims for such benefits. Thus, ERF received no notice of Mr. Henningson's 1993 accident, of his 22% permanent partial impairment rating, or of any benefit payments made to him by others.

Sunnyside and WCF had notice of the claim for permanent partial disability benefits. They accepted liability for and had paid all of the benefits Mr. Henningson applied for, ending in 1995. The Labor Commission pointed to the fact that reports required at the time of the accident had been filed, and to the payments by Sunnyside and WCF in 1994 and 1995, as a basis for its holding that the six-year statute of limitations did not apply to the 2007 filing. Then, the Labor Commission summarily imputed to ERF the notice given to Sunnyside and WCF.

The Labor Commission erred by imputing notice to ERF because ERF is a separate fund entitled to separate notice of claims and proceedings. ERF did not accept liability for Mr. Henningson's injury or pay any benefits to him within the limitations period. It could not have done so because it was unaware of Mr. Henningson's injury or his impairment. ERF was established under the authority of Utah Code Annotated section 35-1-68 (1993) for the express purpose of making payments with respect to permanent total disability caused by industrial accidents or occupational disease occurring on or before June 30, 1994. *See* Utah Code Ann. § 35-1-68 (1993); *see also*

Utah Code Ann. § 34A-2-702 (2011). ERF is not a commercial reinsurer that steps into the shoes of other insurers and is thus bound by their actions or knowledge. In the contractual insurance context, reinsurance is "[i]nsurance of all or part of one insurer's risk by a second insurer, who accepts the risk in exchange for a percentage of the original premium." Black's Law Dictionary 1290-91 (7th ed. 1999). Notes to that definition specify that, in such matters, the first insurer "retains all contact with the original insured, and handles all matters prior to and subsequent to loss." *Id.* A commercial reinsurer, by contract, accepts a portion of risk in exchange for a portion of the insurance premium, leaving adjustment and defense of a claim with the original insurer.

ERF, by contrast, is not a contractual reinsurer. Rather, it is a separate party with statutorily defined rights and liabilities. *See Paoli v. Cottonwood Hosp.*, 656 P.2d 420, 422-23 (Utah 1982). *See also* Utah Code Ann. §§ 35-1-68, 35-1-69 (1993). ERF is the successor to what was previously called the Second Injury Fund and its responsibilities are established by statute, not by contract with private insurers, and it receives none of the premium collected by the commercial carriers. ERF is entitled to defend permanent total claims and may raise defenses distinct from those of the employer or insurer. ERF also has the statutory right to attempt to rehabilitate and retrain an injured worker. *See* Utah Code Ann. § 35-1-67(5) (1993), ERF is a direct party to claims against it and its liability flows directly to the claimant, not through other parties.

Moreover, ERF's liability for the relevant time period is only for permanent total disability benefits. ERF has no responsibility for payment of permanent partial disability benefits and is never a party to claims seeking only those benefits. Permanent partial

disability benefits are materially different than permanent total disability benefits. Permanent partial disability benefits are finite with payments made for a specific number of weeks, established mathematically by schedule or percentage of rated physical impairment. *See* Utah Code Ann. § 35-1-66 (1993). Workers can receive such benefits regardless of their ability to continue working. The temporary total and permanent partial disability benefits that Mr. Henningson initially sought and received are limited and are governed by different statutes than those governing ERF, and they bear different burdens of proof.

Permanent total disability benefits, by contrast, are awarded to a claimant for life after it has been demonstrated that the claimant can no longer work and cannot be rehabilitated or retrained. They are awarded based on findings correlating the worker's physical impairment with the essential functions of work activities for which the worker is or may become qualified. *See* Utah Code Ann. § 35-1-67 (1993). Permanent total disability claims are typically investigated and evaluated with much more scrutiny than partial disability claims, both because of the factual findings needed to support such claims and because the lifetime benefit obligation is more costly to the employer. These large awards of lifetime benefits require that ERF have the opportunity in its own right to investigate, defend and adjust any claims and reserve for potential liability. When given notice, ERF always evaluates and, where appropriate, defends claims made against it.

As a result, ERF is entitled to separate notice of a claim against it. *See Paoli v. Cottonwood Hosp.*, 656 P.2d 420 (Utah 1982). The Court in *Paoli* observed that the Second Injury Fund was created so that employees who suffer from a pre-existing

condition and a subsequent industrial injury can obtain compensation for their disabilities. *Id.* at 422. The "Fund's purposes are to encourage employers to hire handicapped workers and to broaden the base of responsibility for pre-existing conditions." *Id.* The legislature intended that the "Second Injury Fund have the capacity to defend itself against claims." *Id.* Accordingly, the Court has "consistently treated the Second Injury Fund as a separate entity for purposes of its defense of and liability for claims pursuant to . . . the statutes creating it." *Id.* "[O]nce the prospect of Second Injury Fund liability appears, the Fund is surely an 'interested party' or a 'party in interest' under the statutes. It is therefore entitled to receive [notice] in its own right . . . ." *Id.* at 422-23. Parties must notify ERF "as its potential interests become apparent." *Id.* at 423.

The Labor Commission erred by disregarding this requirement. This Court has already rejected the idea that notice of claims may be imputed to ERF in this manner. In *Paoli*, the injured worker argued that the Second Injury Fund could not challenge an award of benefits because it failed to file a timely motion for review after the administrative law judge made the award. *Id.* at 422. The worker claimed that the Second Injury Fund had notice of the order because "the Industrial Commission had timely notice of the order, and . . . the Fund is 'nothing but a closely related arm of the Industrial Commission.'" *Id.* The Court disagreed, explaining that the Second Injury Fund is a separate party entitled to separate notice "**in its own right and through its own authorized representative (rather than through the Industrial Commission generally)**." *Id.* at 423 (emphasis added).

ERF was not given timely notice of Mr. Henningson's claim. There is no dispute that ERF did not receive notice of Mr. Henningson's claim until he filed his Amended Application for Hearing in 2007.[6] Because of Mr. Henningson's late filing, ERF was denied the opportunity to timely investigate, evaluate or defend against the claim for permanent total disability, and was deprived of its statutory right to attempt to rehabilitate Mr. Henningson while he was young and assist him to return to the work force.

When the other parties evaluated Mr. Henningson's claim and paid him all the temporary total and permanent partial disability compensation he applied for, they thought they had completed their obligations to him. They had no reason to treat his claim as if it had been filed under a different statute or anticipate that they would have to respond to a new claim for lifetime benefits to be filed fourteen years later. It follows that they had no reason to protect their interests relating to a future, unfiled claim, let alone look after the future interests of ERF. There is no basis in the record to support the Labor Commission's assumption that Sunnyside's and WCF's investigations were made with ERF's interests or with the defense of a permanent total disability claim in mind. ERF was deprived by Mr. Henningson's delay of the opportunity to timely interview witnesses, conduct examinations, or rehabilitate Mr. Henningson and return him to the

[6] A delay that exceeds the current 6- and 12-year statutes of limitations and repose. Utah Code Ann. § 34A-2-417(2) (2011).

workforce while he was young, thereby potentially avoiding the permanent total disability claim altogether.[7]

Nevertheless, the Labor Commission awarded Mr. Henningson lifetime permanent total disability benefits, including back-benefits and interest accrued at the rate of 8% from the date each payment should have been made for the fourteen period between his injury and application, a period in which ERF had no notice of a coming permanent total disability claim and thus no opportunity to establish reserves against it. The Labor Commission simply ignored the fact that ERF never received notice of Mr. Henningson's claim. But "[t]imely and adequate notice and an opportunity to be heard in a meaningful way are the very heart of procedural fairness." *Nelson v. Jacobsen*, 669 P.2d 1207, 1211 (Utah 1983). The Labor Commission incorrectly imputed notice to ERF and acted substantially to ERF's prejudice by doing so.

III. THE LABOR COMMISSION IMPROPERLY APPLIED *VIGOS*

A. The Plurality Decision.

The Labor Commission's decision to hold ERF liable, even absent a lack of timely notice, was based on the Court's plurality decision in *Vigos v. Mountainland Builders, Inc.*, 2000 UT 2, 993 P.2d 207. *Vigos* involved a construction worker, Vigos, who was injured in an industrial accident in October 1988. *Vigos v. Mountainland Builders, Inc.*, 2000 UT 2, ¶ 2, 993 P.2d 207. Vigos filed a report of injury with WCF and his

[7] If ERF had been aware of the events of 1993 and 1994, it would have been entitled to assume permanent total disability benefits would not be sought, since no application for hearing had been filed within the limitations period and ERF had not been joined as a party.

physician filed a report of work injury with WCF and the Labor Commission. *Id.*, 993 P.2d 207. WCF and Vigos' employer voluntarily paid Vigos temporary total disability benefits for approximately seven months and medical expenses for nine months. *Id.* ¶ 3, 993 P.2d 207.

Shortly after his accident, a doctor evaluated Vigos and informed him that he could return to work with some restrictions and that he would eventually return to his pre-accident level of functioning. *Id.*, 993 P.2d 207. A few months later, Vigos' health care providers informed him that he could return to work without restrictions. *Id.*, 993 P.2d 207. Vigos "had no indication from physicians of permanent disability." *Id.*, 993 P.2d 207.

"Vigos attempted to rehabilitate himself by continuing to work" for five years following his accident. *Id.* ¶ 4, 993 P.2d 207. Vigos worked at various jobs but could not hold them because of his injury. *Id.*, 993 P.2d 207. It was not until 1994, some six years after his accident, that the full extent of Mr. Vigos' injuries became apparent and he suspected that he was permanently and totally disabled. Realizing that his injury had caused him permanent disability, Vigos filed an application for hearing with the Labor Commission seeking permanent total disability compensation, six years and nine months after his accident. *Id.* ¶ 5, 993 P.2d 207. WCF responded that Vigos' claim was filed too late and barred by the applicable six-year statute of limitations. *Id.*, 993 P.2d 207.

The 1988 statute of limitations at issue in *Vigos*, much like the statute applicable to Mr. Henningson's case, provided that:

> A claim for compensation for temporary total disability benefits, temporary partial disability benefits, permanent partial disability benefits, or permanent total disability benefits is wholly barred, unless an application for hearing is filed with the industrial commission within six years after the date of the accident.

See id. ¶ 10, 993 P.2d 207 (quoting Utah Code Ann. § 35-1-99(3) (1988)). WCF and Vigos' employer argued that because Vigos did not file the specific form "Application for Hearing-Form 001" within six years, his claim was time-barred. *Id.* ¶¶ 11, 15, 993 P.2d 207. The Labor Commission argued that a claimant could invoke the Labor Commission's jurisdiction by making any application to the Labor Commission, not just by filing the "Application for Hearing-Form 001," but that some application had to be made within six years of the injury. *Id.* ¶¶ 11, 16, 993 P.2d 207.

A divided court held that Vigos' claim could proceed. Justice Stewart, in an opinion joined by then-Associate Chief Justice Durham, wrote in the plurality opinion that the statute of limitations was satisfied and the Labor Commission had continuing jurisdiction to hear Vigos' claim. *Id.* ¶¶ 1-34, 993 P.2d 207 (plurality opinion). Justice Russon reached the same conclusion in a concurring opinion, but on equitable grounds. *Id.* ¶¶ 35-43, 993 P.2d 207 (concurring opinion). Justices Howe and Zimmerman issued dissenting opinions. *Id.* ¶¶ 44-61, 993 P.2d 207 (dissenting opinions).

The plurality opinion provides that although Vigos did not file an "Application for Hearing-Form 001," he had satisfied the statute of limitations by giving notice to the other parties of his claim. Justice Stewart noted that previous cases have established that no formal claim or application need be filed with the Labor Commission. *Id.* ¶ 16, 993 P.2d 207 (plurality opinion). Justice Stewart discussed *Utah State Insurance Fund v.*

Dutson, 646 P.2d 707 (Utah 1982), in which it was determined that a first report of injury was sufficient to invoke the Labor Commission's jurisdiction because

> great liberality as to form and substance of an application for compensation is to be indulged. However informal the claim may be, it need only give notice to the parties and to the commission of the material facts on which the right asserted is to depend and against whom claim is made.

2000 UT 2, ¶ 17, 993 P.2d 207 (quoting *Utah State Ins. Fund v. Dutson*, 646 P.2d 707, 709 (Utah 1982)) (quotation marks omitted). Notably, in the case cited by Justice Stewart, "'all interested parties'" had received notice of Dutson's claim through informal filings (rather than the formal Application for Hearing) which consisted of an employer's First Report of Injury, a medical report, and an employer's notice of payment of compensation. *Id.*, 993 P.2d 207 (quoting and discussing *Utah State Ins. Fund v. Dutson*, 646 P.2d 707 (Utah 1982)).

Likewise, in Vigos' case, the Court noted "[a]ll interested parties had notice of Vigos' claim and knew the material and jurisdictional facts surrounding his accident. The required forms were filed, liability accepted, disability benefits paid, and medical expenses compensated well within the six-year period." *Id.*, 993 P.2d 207. Such conduct was sufficient for the Labor Commission's jurisdiction to attach; a formal Application for Hearing-Form 001 was not required to give the Labor Commission original jurisdiction over Vigos' claim. *Id.* ¶ 19, 993 P.2d 207.

Justice Stewart also based his determination in significant part on the grounds that Vigos had no reason to file an application because WCF and Mountainland did not contest his claim and Vigos had raised his claim for benefits only eighteen months after

he knew or should have known that he was permanently and totally disabled. *Id.* ¶¶ 20-22, 993 P.2d 207. Prior to filing his application with the Labor Commission, Vigos had no indication that he was permanently and totally disabled. *Id.* ¶ 21, 993 P.2d 207. Vigos did not initially receive an impairment rating and his physicians stated he could eventually return to work without restrictions. *Id.*, 993 P.2d 207. Vigos continued to work for five years following his injury, attempting to reestablish full-time gainful employment. *Id.*, 993 P.2d 207. "The full extent of [Vigos'] injuries became apparent only after several years." *Id.*, 993 P.2d 207.

> Vigos was not attempting to ambush his employer or the Fund with a stale or fraudulent claim. Rather, after receiving initial benefits for his industrial accident and attempting to rehabilitate himself by engaging in further employment, it became apparent that his industrial injuries were far more severe than a mere temporary disability.

Id. ¶ 22, 993 P.2d 207. Justice Stewart therefore determined that Vigos had satisfied the statute of limitations. *Id.* ¶ 25, 993 P.2d 207. He additionally found that because the Labor Commission had original jurisdiction over Vigos' claim, it had continuing jurisdiction to consider Vigos' application and changed circumstances. *Id.* ¶ 26, 993 P.2d 207.

Justice Russon opined that the statute of limitations did not bar Vigos' claim for permanent total disability because WCF and Mountainland were estopped from requiring compliance with the statute of limitations. *Id.* ¶ 37, 993 P.2d 207 (Russon, J., concurring). WCF and Mountainland voluntarily paid Vigos temporary total disability benefits following his accident and within the six-year limitations period. *Id.* ¶ 35, 993 P.2d 207. Neither instructed or required Vigos to file an application with the Labor

Commission. *Id.* ¶ 37, 993 P.2d 207. Because these parties essentially accepted liability and paid benefits to Vigos, he had no reason to file an application for hearing with the Labor Commission. *Id.*, 993 P.2d 207. Justice Russon concluded that WCF's "failure to demand compliance with the statute was thus clearly prejudicial to Vigos' subsequent rights." *Id.* ¶ 38, 993 P.2d 207. WCF was therefore "equitably estopped from belatedly attempting to enforce that which it previously ignored." *Id.*, 993 P.2d 207.

B. Mr. Henningson's Situation is Factually Distinguishable.

In Mr. Henningson's case, the Labor Commission determined that "[t]he logic of either the plurality or concurring *Vigos* decisions compels the conclusion in this case that Mr. Henningson's claim for permanent total disability compensation is not barred by [Utah Code Annotated section 35-1-98(2) (1993)]." (R. at 332.) The Labor Commission thought that Justice Stewart's rationale was satisfied because reports of Mr. Henningson's injury were filed, although no formal application for hearing was filed, and Sunnyside and WCF paid limited disability benefits and medical expenses to Mr. Henningson within six years of his injury. (R. at 332.) The Labor Commission also concluded that Justice Russon's rationale was applicable because Sunnyside's voluntary payment of benefits to Mr. Henningson estopped the respondents from later demanding compliance with the statute of limitations. (R. at 332.)[8]

[8] This holding applies only to Sunnyside (*see* R. at 332), but it appears that the Labor Commission also believed ERF, a separate party, to be estopped from raising the statute of limitations defense by Sunnyside's conduct. Here, the Labor Commission erred. The elements of equitable estoppel are: a statement or act by one party inconsistent with a claim later asserted; reasonable action taken by the other party on the basis of the first party's statement or act; and injury to the second party would result from allowing the

The facts supporting the plurality and concurring opinions in *Vigos* are missing from this case. Vigos first recognized that his injuries were severe and that he was permanently and totally disabled only after years of attempting to work. Because of that delay, Vigos was unable to file his application for hearing until shortly after the limitations period had run. That is not the case here.

Unlike Vigos, Mr. Henningson knew that he was permanently and totally disabled shortly after his injury. He did not attempt to rehabilitate himself and never attempted to return to work. Mr. Henningson's doctors contemporaneously told him that he was totally and permanently disabled and unable to return to work. He promptly sought and received permanent total disability benefits from another source. Indeed, he affirmatively alleged in his 1994 application for Social Security disability benefits that he was permanently and totally disabled as a result of the October 1993 injury. The Social Security Administration agreed, holding that Mr. Henningson has been disabled since suffering his injury and awarded him disability compensation. Yet, he waited nearly fourteen years to first raise his claim for permanent total disability benefits. The sympathetic facts that excused Vigos' late filing are simply not present here or in most other cases, and the holding of *Vigos* should not countenance the late filing of known, ripe claims.

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first party to contradict its earlier act. *Youngblood v. Auto-Owners Ins. Co.*, 2007 UT 28, ¶ 14, 158 P.2d 1088. ERF was a separate party that did not receive notice of Mr. Henningson's claim, did not accept liability and did not pay Mr. Henningson benefits. ERF made no statement nor took any action on which Mr. Henningson could have relied or which ERF could have later contradicted. Indeed, ERF's very first action upon notification of this claim was to raise the statute of limitations defense.

C. The Labor Commission Incorrectly Assumed ERF had Notice.

The Labor Commission's decision should also be reversed because it unfairly and improperly treats all respondents in this case the same. As noted, the Labor Commission held that Justice Stewart's *Vigos* rationale was satisfied here because "reports regarding Mr. Henningson's claim were timely filed, and medical, temporary total, and permanent partial benefits were paid before the six-year filing period ended." (R. at 332.) The Labor Commission, however, fails to distinguish between the respondents when making these blanket assertions. Justice Stewart emphasized in the plurality opinion that Vigos was not required to file an application for hearing because **all** of the respondents in that case were already on notice of Vigos' claim and had accepted liability. At a minimum, a claim for benefits (including, as in *Vigos*, where no formal application is filed but liability is accepted and paid) must give notice to the parties of the facts underlying the claim and against whom the claim is made. 2000 UT 2, ¶ 17, 993 P.2d 207; *Utah State Ins. Fund v. Dutson*, 646 P.2d 707, 709 (Utah 1982). Indeed, the Labor Commission ignores the very language on which it purports to rely that "**[a]ll interested parties had notice** of Vigos' initial claim and knew the material and jurisdictional facts surrounding his accident. . . . In effect, both jurisdiction and liability were conceded by **all** concerned." 2000 UT 2, ¶ 17, 993 P.2d 207 (emphasis added).

In contrast to the respondents in *Vigos*, ERF had no notice of Mr. Henningson's claim until well after the limitations period had run. ERF did not receive notice or otherwise act to concede jurisdiction or liability. Yet, without distinguishing between the parties, the Labor Commission presumed that ERF received notice of Mr. Henningson's

claim, that ERF accepted liability and that ERF paid benefits to Mr. Henningson within the six year limitations period. The assumption that notice to one party constituted notice to all was unfair and prejudicial to ERF. The record demonstrates that Mr. Henningson's permanent total disability and his potential claim against ERF were evident in 1993 and 1994, but ERF had no way of evaluating its potential liability or adjusting its accounts until an application for hearing was filed in 2007. ERF was denied any opportunity to review the claim in a timely manner and had no opportunity to muster its defense while memories were clear and records readily available. Further, Mr. Henningson's late filing denied ERF its statutory right to attempt to rehabilitate Mr. Henningson while he was younger in hopes of avoiding a permanent total disability claim.

This is precisely why the statute of limitations should bar Mr. Henningson's claim. *See id.* ¶ 22, 993 P.2d 207 ("Statues of limitation are intended to prevent unfair dilatory litigation against a defendant and to require that claims be litigated while proper investigation and preservation of evidence can occur."). Mr. Henningson's permanent total disability claim accrued in 1993 and should have been filed within six years of that time to satisfy the statute of limitations. Mr. Henningson's 2007 claim is barred by the statute of limitations.

D. The Labor Commission Improperly Used its Continuing Jurisdiction to Nullify the Statute of Limitations.

The Labor Commission also erred by holding that it had continuing jurisdiction over Mr. Henningson's permanent partial disability claim sufficient to allow the Labor

Commission to require ERF to pay permanent total disability benefits to Mr. Henningson. Section 35-1-78(1) of the Utah Code (1993) provides that:

> [t]he powers and jurisdiction of the commission over each case shall be continuing. The commission, after notice and hearing, may from time to time modify or change its former findings and orders. Records pertaining to cases that have been closed and inactive for ten years, other than cases of total permanent disability or cases in which a claim has been filed as in Section 35-1-98, may be destroyed at the discretion of the commission.

The Labor Commission opined that Mr. Henningson had not received the full benefits to which he was entitled from Sunnyside and WCF. (R. at 333.) Therefore, the Labor Commission concluded, it had the power to order ERF to pay Mr. Henningson benefits and correct the inadequacy. (R. at 333.)

The Labor Commission, however, incorrectly assumed that it had original jurisdiction with respect to ERF. "[T]he [Labor] Commission must obtain initial jurisdiction over a case as a prerequisite to any continuing jurisdiction." *Burgess v. Siaperas Sand & Gravel*, 965 P.2d 583, 586 (Utah Ct. App. 1998). Initial or original jurisdiction is established where "an injured worker has filed a timely application for hearing," 965 P.2d at 87, or where the equivalent has occurred, as in *Vigos v. Mountainland Builders, Inc.*, 2000 UT 2, 993 P.2d 207. But Mr. Henningson's Amended Application for Hearing was untimely and, as discussed, *Vigos* should not apply. The Labor Commission did not have initial jurisdiction over ERF in this matter and therefore could not exercise continuing jurisdiction.

But even assuming the Labor Commission had initial jurisdiction, its exercise of continuing jurisdiction in this matter was improper. The Labor Commission based its

determination on *Spencer v. Industrial Commission*, 733 P.2d 158 (Utah 1987). The *Spencer* court stated that the Labor Commission could modify awards of disability benefits under its continuing jurisdiction where there was "evidence of some **significant change or new development in the claimant's injury** or proof of the **previous award's inadequacy**." 733 P.2d at 161 (emphases added). Rather than adjusting its prior permanent partial disability award because of a change of condition, however, the Labor Commission attempted to exercise its continuing jurisdiction to modify or change the statute of limitations applicable to permanent total disability claims. Such a result is expressly prohibited. *See* Utah Code Ann. § 35-1-78(3) (1993).

In order to invoke the Labor Commission's continuing jurisdiction, it was Mr. Henningson's affirmative burden to prove a substantial change in condition and prove medical and legal causation of his disability. *Burgess v. Siaperas Sand & Gravel*, 965 P.2d 583, 588 (Utah Ct. App. 1998). Medical causation requires proof of a "medically demonstrable causal link". *Allen v. Indus. Comm'n*, 729 P.2d 15, 27 (Utah 1986). *See also Large v. Indus. Comm'n*, 758 P.2d 954, 957 (Utah Ct. App. 1988). But Mr. Henningson did not ask for a modification of his prior award of permanent partial disability benefits—he sought a new award of new permanent total disability benefits dating back to the time of his injury. Even there, Mr. Henningson offered no medical evidence to show a substantial change in condition. He mentioned some subjective complaints consistent with advancing age, but his measured level of medical impairment and his employment status have remained unchanged since his injury. He told the Social Security Administration that he was totally disabled in 1994 and was unable to return to

work. There was no change in this status between 1994 and 2007 when he filed his Amended Application for Hearing. Mr. Henningson cannot claim that he is now more permanently or more totally disabled as a basis for a new entitlement to benefits.

Further, there was no proof of any previous award's inadequacy, especially with respect to ERF. The Utah Court of Appeals has explained that "the purpose of the Labor Commission's continuing jurisdiction 'is to take care of changed conditions or developments of some kind justifying a modification of a *previous award.*'" *Workers Compensation Fund v. Labor Comm'n*, 2006 UT App 476, No. 20060103-CA, 2006 WL 3456315, at *2 (quoting *Hardy v. Indus. Comm'n*, 58 P.2d 15, 18 (Utah 1936)) (emphasis added by the court). The exercise of continuing jurisdiction is "improper" where, as here, "there is no award to modify." *Workers Compensation Fund*, 2006 WL 3456315, at *2. There must have been some significant change since the award to render it inadequate.

The previous award in this case was the Compensation Agreement for the accident of October 13, 1993. It was signed by Mr. Henningson and his attorney, Virginius Dabney, and was approved by the then-Industrial Commission on March 5, 1995. It approved compensation payments for the 7% additional impairment caused by that accident, in addition to the 15% impairment for previous accidents that had already been paid. Where Mr. Henningson was originally compensated on the basis of a combined 22% impairment, and there has been no change in that impairment rating since, it is difficult to see how that award was inadequate—Mr. Henningson received all the compensation he asked for.

Further, there was no previous award against ERF that could be considered inadequate and modified. Sunnyside and WCF accepted liability and paid temporary total and permanent partial disability benefits to Mr. Henningson following his accident, but ERF could not have been implicated in whatever inadequacy the Labor Commission recently perceived in those payments. Any inadequacy in the amount of money he received resulted only from his failure to seek permanent total disability benefits within the limitations period.

Mr. Henningson now asks the Court to excuse his dilatory conduct and to award him permanent total disability benefits and interest dating back to 1993, based on his 2007 filing. But he cannot have it both ways. If his claim for permanent total disability benefits is based on the date of his 1993 accident because he was disabled as a result, his 2007 application was filed years too late. If, instead, his claim for permanent total disability benefits is based on a substantially changed condition, then benefits may **only** be sought from the later time his medical condition worsened to the extent he became permanently and totally disabled. In other words, he would only be entitled to receive an award of benefits starting from the time his partial impairment progressed to the point of total disability; he would not be entitled to an award of benefits and interest dating back to the earlier date of his 1993 injury. Mr. Henningson has failed to allege and prove a significant change or progression in his condition.

The Labor Commission, citing *Ortega v. Meadow Valley Construction*, 2000 UT 24, 996 P.2d 1039, also suggested that its conclusion is supported by a 1999 amendment to the Workers Compensation Act that imposes twelve-year time limit on the Labor

Commission's continuing jurisdiction. (R. at 333.) Its discussion is inapt because the amendment is not argued here, as the Labor Commission recognized. Even if it were, the twelve-year statute of repose would preclude the Labor Commission's award.

Moreover, *Ortega* illustrates why the Labor Commission's determination in this case was incorrect. The Court there stated that the Labor Commission obtains initial jurisdiction where the injured worker "has once complied with the six-year statute of limitations." *Ortega*, 2000 UT 24, ¶ 10, 996 P.2d 1039. The *Ortega* Court explained that notice to a defendant within the limitations period is critical because it informs the defendant "that the continuing jurisdiction of the Commission is invoked, and at some time in the future, . . . the worker may request another hearing if his physical condition due to the accident has worsened." *Id.* ¶ 13, 996 P.2d 1039. Proper notice allows the defendant to "provide for a reserve to pay any future benefits that may be awarded." *Id.*, 996 P.2d 1039. Mr. Henningson did not comply with the six year statute of limitations and the Labor Commission's exercise of continuing jurisdiction put ERF at a disadvantage. If his prior "award" was inadequate, it was because Mr. Henningson failed to timely claim and demonstrate entitlement to permanent total disability benefits.

E. Equitable Principles Bar Mr. Henningson's Untimely Claim.

The Labor Commission failed to address ERF's invocation of the equitable principles of waiver and laches based in the prejudice to ERF from Mr. Henningson's late filing. Mr. Henningson, in turn, argues that equitable defenses do not apply to claims brought before the Labor Commission. (*See* Henningson's Brief to the Utah Court of Appeals at 25-26 (July 13, 2011).) Here, having invoked the holding of *Vigos* to support

and award of permanent total disability benefits, both the Labor Commission and Mr. Henningson ignore the fact that equitable principles were a clear underpinning of that holding.

In his concurring opinion in *Vigos*, Justice Russon relied on the principle of equitable estoppel to conclude that the respondents could not demand compliance with the application filing requirement. *See Vigos v. Mountainland Builders, Inc.*, 2000 UT 2, ¶¶ 38-43, 993 P.2d 207. The Labor Commission expressly relied on the concurring opinion to hold that the respondents here were estopped from demanding compliance with the statute of limitations. (*See* R. at 332.) Yet the Labor Commission refused to address the argument that equitable principles barred Mr. Henningson's untimely claim for permanent total disability benefits from ERF. The Labor Commission's decision seems to suggest that the principles of equity are available only to aid claimants. But, if estoppel may be invoked against ERF, then equitable defenses must equally be available to ERF. The doctrines applicable here include laches and waiver.

"The equitable doctrine of laches is founded upon considerations of time and injury. 'Laches in legal significance is not a mere delay, but delay that works a disadvantage to another.'" *Mawhinney v. Jensen*, 232 P.2d 769, 773 (Utah 1951) (quoting Pomerory's Equity Jurisprudence § 1442 (4th ed.)). In this case, ERF was prejudiced by Mr. Henningson's nearly fourteen-year delay in bringing his claim for permanent total disability benefits. ERF had no opportunity to adjust, defend, or timely evaluate this case—all steps ERF would have taken had Mr. Henningson's claim been timely filed. By the time Mr. Henningson filed his claim for benefits, ERF could not

evaluate Mr. Henningson's condition, attempt vocational rehabilitation, or attempt to put Mr. Henningson back to work in 2007 as if it were 1994. The significant passage of time between Mr. Henningson's injury and the filing of his Amended Application for Hearing clearly acts to the prejudice of ERF.

The doctrine of waiver similarly precludes Mr. Henningson's claim. "Waiver is an intentional relinquishment of a known right." *Pasker, Gould, Ames & Weaver, Inc. v. Morse*, 887 P.2d 872, 876 (Utah Ct. App. 1994). Silence or a failure to act is generally not a waiver unless there is some obligation to speak. *Soter's, Inc. v. Deseret Fed. Sav. & Loan Ass'n*, 857 P.2d 935, 940 (Utah 1993). The statute of limitations is in essence a codification of the waiver doctrine; i.e., a party's failure to file a claim for an accrued cause of action is a manifestation that the party intends to relinquish his or her known rights.

The statute of limitations required Mr. Henningson to act. Mr. Henningson was represented by counsel and, knowing all of the facts underlying his claim, had a duty to assert it if at all within six years of the time of his accident. Yet he delayed filing an application with the Labor Commission for over a decade. ERF received no notice of Mr. Henningson's claim and, as discussed above, was prejudiced by the delay.

The Labor Commission's decision to hold ERF liable for the payment of permanent total disability benefits renders the statute of limitations and similar equitable principles completely meaningless. Mr. Henningson knew and affirmatively alleged he was permanently and totally disabled shortly after his accident in 1993. He never sought to return to work. Mr. Henningson was paid the entire universe of benefits he applied for

during the limitations period, which ran in 1999. He first put ERF on notice of the injury in 2007, almost fourteen years after his accident happened. If the statute of limitations is to have any meaning at all in the workers compensation realm, it must bar this claim.

IV. *VIGOS* SHOULD BE REEXAMINED BY THE COURT

The Labor Commission has uniformly taken the position since the plurality opinion in *Vigos* was issued that it has continuing jurisdiction to consider late-filed applications for hearing in permanent total disability cases, regardless of how long after the accident the application is filed. (*See* R. at 332.) It took that position in this case, for example, even though none of the facts that justified Vigos' late filing were present. The Labor Commission ordered ERF to pay significant lifetime benefits dating back to the time of the accident because the Labor Commission believed it had continuing jurisdiction following the filing of the initial report of injury.

The unusual facts supporting *Vigos* should not support a blanket exemption from the statute of limitations in other cases just because initial reports are filed or uncontested benefits paid. The Workers Compensation Act already requires that reports be filed following all industrial accidents and bars unreported claims. *See* Utah Code Ann. § 35-1-97 (1993). If the filing of required reports were all that is required for the Labor Commission to assert continuing jurisdiction, then the statute of limitations would be entirely superfluous. Unreported claims are already barred by section 35-1-97.

Further, the Utah Legislature declared that the Labor Commission's continuing jurisdiction over properly filed claims cannot operate to revive time-barred claims. The continuing jurisdiction statute itself declares that "[t]his section may not be interpreted as

modifying in any respect the statutes of limitations contained in other sections of this chapter" and that "**[t]he commission has no power to change the statutes of limitation . . . in any respect.**" Utah Code Ann. § 35-1-78(3)(a), (b) (1993) (emphasis added). Where a claimant fails to assert a timely claim, the Labor Commission may not invoke its continuing jurisdiction to justify a new award of a different type of benefits provided under a different statute. It is the injured employee's affirmative burden to seek and prove entitlement to benefits within the limitations period. Continued jurisdiction exists to modify existing awards where there has been a significant change of condition; it cannot be invoked to nullify the statute of limitations.

Vigos must mean something more than the interpretation given it here by the Labor Commission. *Vigos* cannot stand for the general proposition that a claimant may sleep on a claim for permanent total disability benefits when that claim is ripe within the six-year limitations period. ERF does not believe that was this Court's intent in deciding *Vigos*, and the statutes at issue bar such an interpretation. When interpreting a statute, the Court does not read "individual words and subsections in isolation; [its] interpretation of a statute requires that each part or section be 'construed in connection with every other part or section so as to produce a *harmonious whole*.'" *Ivory Homes, Ltd. v. Utah State Tax Comm'n*, 2011 UT 54, ¶ 21, 266 P.3d 751 (quoting *Anderson v. Bell*, 2010 UT 47, ¶ 9, 234 P.3d 1147). The Court surely did not intend to give the Labor Commission the authority to ignore the statute of limitations under the guise of its continuing jurisdiction. Yet, that is how *Vigos* has been applied.

ERF recognizes that *Vigos* presented a hard case and that strict application of the statute of limitations may have been inequitable there. Vigos did not know he was permanently and totally disabled. He went back to work and did not know his injury was more serious than initially thought until the end of the limitations period. *Vigos v. Mountainland Builders, Inc.*, 2000 UT 2, ¶ 22, 993 P.2d 207. Further, all of the interested parties had notice of Vigos' claim within the six year limitations period. *Id.* ¶ 17, 993 P.2d 207. Under those unusual circumstances, it is understandable how the Court arrived at its decision. It is said that hard cases make bad law, and ERF respectfully suggests that broad application of *Vigos* to cases lacking the peculiar facts of that case is not good law.

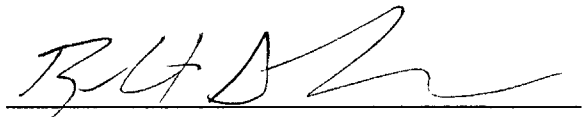
"Statutes of limitations are intended to prevent unfair dilatory litigation against a defendant and to require that claims be litigated while proper investigation and preservation of evidence can occur." *Id.* ¶ 22, 993 P.2d 207. "Limiting compensation claims to a . . . period from the date of the accident protects employers and the State of Utah Second Injury Fund from having to defend stale claims—a legitimate legislative purpose." *Avis v. Bd. of Review of Indus. Comm'n*, 837 P.2d 584, 588 (Utah Ct. App. 1992). The policy behind statutes of limitations is precisely to prevent pursuit of untimely and prejudicial claims such as those advanced by Mr. Henningson. Because of the Labor Commission's award of benefits in this case is predicated on the holding of *Vigos* , ERF invites the Court to reexamine that decision.

CONCLUSION

The statute of limitations is meaningless if it does not apply in this case. The decision of the Utah Labor Commission should be reversed and Mr. Henningson's claim for permanent total disability compensation should be denied.

Dated this 26th day of March 2012.

CLYDE SNOW & SESSIONS



EDWIN C. BARNES
ROBERT D. ANDREASEN
Attorneys for Employers' Reinsurance Fund

CERTIFICATE OF SERVICE

I hereby certify that I caused two true and correct copies of the foregoing Replacement Brief of Appellant Employers' Reinsurance Fund, as well as a searchable electronic copy, to be mailed, via U.S. mail postage prepaid, to the following this 26th day of March 2012:

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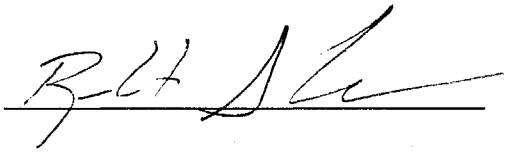
CERTIFICATE OF COMPLIANCE

I certify that this Replacement Brief complies with the type-volume limitation of Utah Rule of Appellate Procedure 24(f)(1)(A) because this Replacement Brief contains 10,911 words (including headings, footnotes and quotations) in 13 point Times New Roman font, excluding the parts of the Replacement Brief exempted by Rule 24(f)(1)(B), as calculated by Microsoft Word 2007, the word processing system used to prepare the Replacement Brief.



ADDENDUM

A. Utah Code Annotated § 35-1-98 (1993)

B. Utah Code Annotated § 35-1-78 (1993)

C. Findings of Fact, Conclusions of Law, and Order (Nov. 15, 2007)

D. Order on Motion for Review (Dec. 27, 2010)

ADDENDUM

A

U.C.A. 1953 § 35-1-98

UTAH CODE, 1953
TITLE 35. LABOR — INDUSTRIAL COMMISSION
CHAPTER 1. WORKERS' COMPENSATION

35-1-98 Claims and benefits.

(1) Except with respect to prosthetic devices, in nonpermanent total disability cases an employee's medical benefit entitlement ceases if the employee does not incur medical expenses reasonably related to the industrial accident, and submit those expenses to his employer or insurance carrier for payment, for a period of three consecutive years.

(2) A claim for compensation for temporary total disability benefits, temporary partial disability benefits, permanent partial disability benefits, or permanent total disability benefits is barred, unless an application for hearing is filed with the commission within six years after the date of the accident.

(3) A claim for death benefits is barred unless an application for hearing is filed within one year of the date of death of the employee.

History: C. 1953, **35-1-98**, enacted by L. 1990, ch. 69, § 6.

NOTES, REFERENCES, AND ANNOTATIONS

Repeals and Reenactments. — Laws 1990, ch. 69, § 6 repeals former § **35-1-98**, as last amended by Laws 1967, ch. 66, § 2, relating to control of physicians, and enacts the present section, effective April 23, 1990.

U. C. A. 1953 § 35-1-98
UT ST § 35-1-98

END OF DOCUMENT

ADDENDUM

B

U.C.A. 1953 § 35-1-78

UTAH CODE, 1953
TITLE 35. LABOR — INDUSTRIAL COMMISSION
CHAPTER 1. WORKERS' COMPENSATION

35-1-78 Continuing jurisdiction of commission to modify award — Authority to destroy records — Interest on award — No authority to change statutes of limitation.

(1) The powers and jurisdiction of the commission over each case shall be continuing. The commission, after notice and hearing, may from time to time modify or change its former findings and orders. Records pertaining to cases that have been closed and inactive for ten years, other than cases of total permanent disability or cases in which a claim has been filed as in Section 35-1-98, may be destroyed at the discretion of the commission.

(2) Awards made by the Industrial Commission shall include interest at the rate of 8% per annum from the date when each benefit payment would have otherwise become due and payable.

(3) (a) This section may not be interpreted as modifying in any respect the statutes of limitations contained in other sections of this chapter or Title 35, Chapter 2, the Utah Occupational Disease Disability Law.

(b) The commission has no power to change the statutes of limitation referred to in Subsection (a) in any respect.

History: L. 1917, ch. 100, § 83; C.L. 1917, § 3144; R.S. 1933 & C. 1943, 42-1-72; L. 1961, ch. 71, § 1; 1963, ch. 49, § 1; 1965, ch. 68, § 1; 1981, ch. 287, § 5; 1988, ch. 116, § 8; 1990, ch. 69, § 4.

NOTES, REFERENCES, AND ANNOTATIONS

Amendment Notes. — The 1988 amendment, effective July 1, 1988, designated the previously undesignated two paragraphs as Subsections (1) and (2), added Subsection (3) and, in Subsection (1), divided the formerly undivided language into three sentences and rewrote the contents thereof.

The 1990 amendment, effective April 23, 1990, substituted "Section 35-1-98" for "Section 35-1-99" in the last sentence in Subsection (1).

U. C. A. 1953 § 35-1-78
UT ST § 35-1-78

END OF DOCUMENT

ADDENDUM

C

UTAH LABOR COMMISSION
ADJUDICATION DIVISION
PO Box 146615
Salt Lake City, Utah 84114-6615
801-530-6800

CECIL HENNINGSON, **Petitioner,** **vs.** **SUNNYSIDE COAL COMPANY and/or WORKERS COMPENSATION FUND, EMPLOYERS REINSURANCE FUND** **Respondent.**	**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Case No. 07-0253** **Judge Debbie L. Hann**

HEARING: Labor Commission, 160 East 300 South, Salt Lake City, Utah, on August 20, 2007 1:00 PM. Said Hearing was pursuant to Order and Notice of the Commission.

BEFORE: Debbie L. Hann, Administrative Law Judge.

APPEARANCES: The petitioner, Cecil Henningson, was present and represented by his attorney Jeffery Cottle Esq.

The respondents, Sunnyside Coal Company and Workers Compensation Fund were represented by attorney Hans Scheffler Esq.

The respondent, Employers Reinsurance Fund, was represented by attorney Edwin C Barnes Esq.

STATEMENT OF THE CASE

The petitioner's March 14, 2007 Application for Hearing alleges entitlement to permanent total disability compensation and interest as the result of a September 3, 1993 low back injury. The Commission initiated an adjudicative proceeding the following day with an Order for Answer.

The respondents', Sunnyside Coal and Workers Compensation Fund (hereinafter "WCF"), April 12, 2007 Answer admitted the petitioner was suffered a low back injury on October 13, 1993 for which compensation was paid but denied the remaining allegations in the Application for lack of knowledge and affirmatively alleged the petitioner was not permanently totally disabled as the result of this industrial accident.

The respondent's, Employers Reinsurance Fund (hereinafter "ERF"), April 13, 2007 Answer denied the allegations in the Application for lack of knowledge and affirmatively alleged the petitioner is not permanently totally disabled as the result of the alleged accident nor that the petitioner suffered from a 10% pre-existing condition requiring apportionment of medical expenses with the other respondents.

The petitioner filed an Amended Application for Hearing on May 10, 2007 amending the date of injury to October 13, 1993. WCF's Answer re-asserted the prior defenses and affirmatively alleged the petitioner's claim was barred by the statute of limitations and that the petitioner suffered from at least a 15% whole person impairment prior to the October 13, 1993 accident.

Prior to the hearing, WCF filed a Motion for Summary Judgment asserting the petitioner's claim is barred by Utah Code § 35-1-98(2) because the petitioner did not file an Application for Hearing with the Commission within 6 years after the date of the accident. The petitioner opposed the motion. The Motion for Summary Judgment was denied.

FINDINGS OF FACT

The petitioner was injured by accident arising out of and in the course of his employment with the respondent, Sunnyside Coal Company, on October 13, 1993. This accident resulted in a low back injury. Prior to this injury, the suffered from at least a 10% pre-existing condition.

The petitioner suffered several prior back injuries as the result of accidents while employed by Sunnyside Coal. After the October 13, 1993 industrial accident, the petitioner underwent a third back surgery. The petitioner's last day worked was October 13, 1993, the day of the industrial accident. The petitioner was paid by temporary total disability compensation and permanent partial disability compensation by WCF following the October 13, 1993 accident. Dr. Momberger assigned a 22% whole person impairment for the petitioner's low back condition on December 14, 1995. The last compensation payment was made by WCF on June 8, 1995.

The petitioner was awarded Social Security disability compensation on April 28, 1995 for a disability onset date of October 14, 1993. The basis of the award was the petitioner's low back condition as the result of the October 13, 1993 accident. A significant cause of the petitioner's disability for which he receives Social Security is the October 13, 1993 industrial accident.

The petitioner is tentatively permanently totally disabled as the result of the October 13, 1993 industrial accident. The petitioner never returned to gainful employment following this accident. The petitioner was paid temporary total disability compensation following this injury through December 15, 1994. The petitioner is tentatively permanently totally disabled as the result of this industrial injury beginning December 16, 1994.

The parties stipulated the petitioner's weekly compensation rate for this claim is $351.00.

PRINCIPLES OF LAW

The Commission can rely on a Social Security disability determination of disability to find an injured worker permanently totally disabled if a significant cause of the disability is caused by the industrial accident. R612-1-10(B), U.A.C.

Utah Code § 35-1-98(2) (effective on October 13, 1993) states:

> A claim for compensation for temporary total disability benefits, temporary partial disability benefits, permanent partial disability benefits, or permanent total disability benefits is barred, unless an application for hearing is filed with the commission within six years after the date of the accident.

Utah Code § 35-1-78(1) (effect on October 13, 1993) states:

> The powers and jurisdiction of the commission over each case shall be continuing. The commission, after notice and hearing, may from time to time, modify or change its former findings and orders. Records pertaining to cases that have been closed and inactive for ten years, other than cases of permanent total disability or cases in which a claim has been filed as in Section 35-1-98, may be destroyed at the discretion of the commission.

The Utah Supreme Court interpreted the interplay between these two provisions of the Workers Compensation Act as it relates to claims filed with the Commission more than 6 years after the injury date in Vigos v. Mountainland Builders, Inc., 993 P.2d 207 (Utah 2000).

In that case, Vigos' claim for compensation had been accepted and paid by the carrier so he never filed an application for hearing with the Commission until more than 6 years after his injury date when he made a claim for permanent total disability compensation which had been denied by the carrier. The Court held that the statute of limitations requirements of Utah Code 35-1-98(2)[1] were met when "...the required forms were filed, disability benefits paid and medical expenses compensated before the six-year period ended." Id. at 214. Once this had been met, the Commission acquired continuing jurisdiction under Utah Code § 35-1-78, which has no time limitation.

[1] This provision was found at Utah Code § 35-1-99(3) at the time Mr. Vigos' claim arose.

In this case, the respondent asserts that the petitioner's claim for permanent total disability compensation "vested" at the time he was awarded Social Security Disability compensation based upon his low back condition which was caused by the industrial accident, as well as various doctors opinions stating he was disabled as well as his inability to work and lack of gainful employment. As a result, the respondents assert that by waiting until 2007 to file his claim for permanent total disability compensation, his claim fails under Utah Code § 35-1-98.

The Court's decision in Vigos makes clear however, that once notice of the claim is given within 6 years, the statute of limitations in § 35-1-98 is met and the Commission then retains continuing jurisdiction to hear subsequent claims and that there is no time limit to that continuing jurisdiction. There is nothing in the language of Utah Code § 35-1-78 or 35-1-98 that places an additional requirement that an injured worker's time limits for filing a claim are based upon when he knew or should have known he had a claim for additional compensation. Although the Court in Vigos cites facts that during the period after Mr. Vigos received temporary total disability compensation and his claim for permanent total disability compensation, he attempted to work and rehabilitate himself following the injury, these facts are incidental to the Court's reasoning and interpretation of the operation of Utah Code § 35-1-98 and 35-1-78.

The ruling in Vigos also applies to the ERF. In Nelson v. Utah Local Governments Trust and Employers Reinsurance Fund, LC Case # 03-0037, the Commission rejected the ERF's assertion that the six year statute of limitations is not met as to the ERF when the carrier pays compensation.

Upon a finding of tentative permanent total disability under Utah Code § 35-1-67 (effective on October 13, 1993), the case is required to be referred to the Utah State Office of Rehabilitation. Utah Code § 35-1-67(5) (effective on October 13, 1993) unless otherwise agreed by the parties.

"The period of benefits commences on the date the employee became permanently totally disabled...and ends with the death of the employee or when the employee is capable of returning to regular, steady work." Utah Code § 35-1-67(5)(b)(iv) (effective on October 13, 1993).

Utah Code § 35-1-69 (effective on October 13, 1993) requires the ERF to pay the first $20,000.00 of medical benefits and 50% of the medical expenses thereafter along with the initial three years of permanent total disability compensation when an injured worker who has at least a 10% whole person impairment from any cause incurs an additional impairment that results in permanent total disability.

Permanent total disability compensation is reduced by 50% of Social Security retirement benefits received by an injured worker.

CONCLUSIONS OF LAW

The petitioner suffered a compensable industrial injury on October 13, 1993 while employed by the respondent, Sunnyside Coal Company.

The petitioner is tentatively permanently totally disabled as the result of the October 13, 1993 industrial accident.

The respondents are liable to the petitioner for permanent total disability compensation for the period December 16, 1994 through December 8, 2002 (first 312 weeks) in the amount of $109,512.00 less credit to WCF for payment of permanent partial disability compensation in the amount of $6,864.00 plus interest less attorney's fees. The amount payable by WCF for this period is $47,892.00 plus interest. The amount payable by ERF for this period is $54,756.00 plus interest.

The respondent, ERF, is liable to the petitioner for permanent total disability compensation for the period December 9, 2002 through November 13, 2007 (257.28 weeks) in the amount of $351.00 per week for a total of $90,305.28 plus interest.

The respondent, ERF, is liable to the petitioner for ongoing permanent total disability compensation beginning November 14, 2007 at the rate of $351.00 per week and continuing until the petitioner dies or is capable of returning to regular steady work. This amount, or 36% of the current state average weekly wage rounded to the nearest dollar, whichever is higher, shall be reduced by 50% of any Social Security retirement benefits the petitioner may receive.

The respondent, WCF is entitled to reimbursement from the respondent, ERF for the first $20,000.00 of medical benefits and 50% of the medical expenses thereafter.

The petitioner shall be referred to Utah State Office of Rehabilitation for evaluation. The ERF is liable to the Utah State Office of Rehabilitation for an amount not to exceed $3,000.00 for use in the rehabilitation and training of the petitioner.

ORDER

IT IS THEREFORE ORDERED that the respondents pay the petitioner for permanent total disability compensation for the period December 16, 1994 through December 8, 2002 (first 312 weeks) in the amount of $109,512.00 less credit to WCF for payment of permanent partial disability compensation in the amount of $6,864.00 plus interest less attorney's fees awarded below. The amount payable by WCF for this period is $47,892.00. The amount payable by ERF for this period is $54,756.00. These amounts are accrued and due and payable plus interest at the rate of 8% per annum.

IT IS FURTHER ORDERED that the respondent, ERF, pay the petitioner for permanent total disability compensation for the period December 9, 2002 through November 13, 2007 (257.28 weeks) in the amount of $351.00 per week for a total of $90,305.28. This amount is accrued and due and payable plus interest at the rate of 8% per annum.

IT IS FURTHER ORDERED that the respondent, ERF, deduct from the amounts payable to the petitioner the amount of $12,250.00 as attorney's fees and pay this amount directly to Jeffrey Cottle, Attorney at Law.

IT IS FURTHER ORDERED that the respondent, ERF, pay the petitioner for ongoing permanent total disability compensation beginning November 14, 2007 at the rate of $351.00 per week and continuing until the petitioner dies or is capable of returning to regular steady work. This amount, or 36% of the current state average weekly wage rounded to the nearest dollar, whichever is higher, shall be reduced by 50% of any Social Security retirement benefits the petitioner may receive.

IT IS FURTHER ORDERED that the respondent, WCF is entitled to reimbursement from the respondent, ERF for the first $20,000.00 of medical benefits and 50% of the medical expenses thereafter.

IT IS FURTHER ORDERED that the petitioner shall be referred to Utah State Office of Rehabilitation for evaluation. The ERF shall pay to the Utah State Office of Rehabilitation an amount not to exceed $3,000.00 for use in rehabilitation and training of the petitioner.

DATED this 15th day of November, 2007.

Debbie L. Hann
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion for Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for

review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their responses to the Motion for Review within 20 days of the date of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its response. If none of the parties specifically request review by the Appeals Board, the review will be conducted by the Utah Labor Commission.

Cecil Henningson vs. Sunnyside Coal Company and/or Employers Reinsurance Fund; Workers Compensation Fund Case No. 07-0253

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the attached Findings of Fact, Conclusions of Law and Order, was mailed by prepaid U.S. postage on November 15, 2007, to the persons/parties at the following addresses:

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Sunnyside Coal Company
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Sunnyside UT 84539

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Salt Lake City UT 84114

Workers Compensation Fund
Dennis V Lloyd Designated Agent
392 E 6400 S
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Jeffery Cottle Esq
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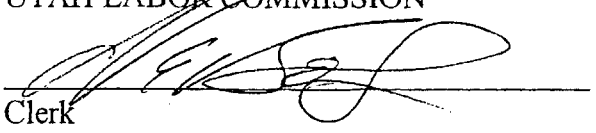
UTAH LABOR COMMISSION



Clerk
Adjudication Division

ADDENDUM

D

UTAH LABOR COMMISSION

CECIL HENNINGSON, **Petitioner,** **vs.** **SUNNYSIDE COAL COMPANY, WORKERS COMPENSATION FUND and EMPLOYERS' REINSURANCE FUND,** **Respondents.**	**ORDER ON MOTION FOR REVIEW** **Case No. 07-0253**

Sunnyside Coal Company and its insurance carrier, Workers Compensation Fund, (referred to jointly as "Sunnyside") and the Employers' Reinsurance Fund ("ERF") ask the Utah Labor Commission to review Administrative Law Judge Hann's decision awarding permanent total disability compensation to Cecil Henningson under the Utah Workers' Compensation Act.[1]

The Labor Commission exercises jurisdiction over this motion for review pursuant to § 63G-4-301 of the Utah Administrative Procedures Act and § 34A-2-801(3) of the Utah Workers Compensation Act.

BACKGROUND AND ISSUE PRESENTED

Mr. Henningson's Application For Hearing, filed with the Commission on March 14, 2007, claims permanent total disability compensation for back injuries from a work accident at Sunnyside Coal Company on October 13, 1993. Judge Hann held an evidentiary hearing and then awarded the requested compensation. Judge Hann also apportioned liability for Mr. Henningson's disability compensation and medical expenses between Sunnyside and the ERF.

In requesting review of Judge Hann's decision, Sunnyside and the ERF argue that Mr. Henningson's claim for permanent total disability compensation is barred by § 98 (2) of the Act. They also argue that, even if the claim is not barred by § 98 (2), Mr. Henningson has not shown circumstances that would allow the Commission to grant benefits as an exercise of the Commission's continuing jurisdiction under § 78 of the Act. Finally, in the event that Mr. Henningson's claim is allowed, the ERF contests its liability to reimburse Sunnyside for Mr. Henningson's initial medical expenses, while Sunnyside argues it is only liable for the first 156 weeks of Mr. Henningson's permanent total disability compensation.

---

[1] On October 13, 1993, the date of Mr. Henningson's accident and injury, the Utah Workers' Compensation Act was codified as Title 35, Chapter 1, Utah Code Annotated. This decision refers to the substantive provisions of the Act as they were codified on that date.

FINDINGS OF FACT

The following facts are material to the issues raised by Sunnyside and the ERF.

Mr. Henningson worked in the coal mining industry for many years prior to October 13, 1993, the date of the accident that gives rise to his current claim for permanent total disability compensation. During those earlier years as a miner, Mr. Henningson was involved in several work accidents and underwent two back surgeries, leaving him with permanent, whole-person impairments totaling at least 10%.

On October 13, 1993, while Mr. Henningson was working for Sunnyside as a roof bolter, he attempted to lift a heavy device known as a "stopper." As a result of this exertion, Mr. Henningson again injured his back and underwent a third back surgery. All reports required by the Commission were filed at the time of the accident and Sunnyside accepted liability for Mr. Henningson's workers' compensation benefits. Specifically, Sunnyside paid for Mr. Henningson's medical care, temporary total disability compensation, and permanent partial disability compensation.

Mr. Henningson reached medical stability from the October 1993 accident and subsequent surgery on December 15, 1994. As a result of the accident, his permanent, whole-person impairments increased to a total of 22%. In April 1995, the Social Security Administration awarded social security disability benefits to Mr. Henningson, based on the Administration's findings that he: 1) had a severe injury; 2) could not perform the work he had done in the past; and 3) could not perform other types of work.

Mr. Henningson never returned to work or looked for work after the October 1993 accident. Sunnyside and the ERF concede that Mr. Henningson is now permanently and totally disabled. Mr. Henningson did not file an application with the Commission to claim permanent total disability compensation until March 14, 2007.

DISCUSSION AND CONCLUSION OF LAW

The parties agree Mr. Henningson's injury from the October 1993 accident at Sunnyside is generally compensable under the Utah Workers' Compensation Act. They also concede that Mr. Henningson is now permanently and totally disabled as a result of the injury. What is in dispute is whether Mr. Henningson's delay in bringing his claim for permanent total disability compensation precludes him from receiving those benefits. Additionally, in the event Mr. Henningson is entitled to benefits, Sunnyside and the ERF dispute Judge Hann's allocation of liability for those benefits. These issues are addressed below.

Section 98 (2) as a bar to Mr. Henningson's claim. Mr. Henningson did not file an application for permanent total disability compensation until more than 13 years after the accident.

Section 98 (2) provides that "[a] claim for compensation for . . . permanent total disability benefits is wholly barred, unless an application for hearing is filed with the [Labor Commission] within six years after the date of the accident."

The proper interpretation of § 98 (2)'s six-year filing requirement was considered by the Utah Supreme Court in *Vigos v. Mountainland Builders*, et al, 993 P.2d 207 (Utah 2000). In that case, Mr. Vigos was injured at work during October 1988. The injury was properly reported and the employer's insurance carrier voluntarily paid medical benefits, temporary total disability compensation and permanent partial disability compensation. For several years, Mr. Vigos attempted unsuccessfully to return to work. Finally, after receiving a social security determination that he was totally disabled, Mr. Vigos filed an application for permanent total disability compensation with the Commission on July 11, 1995, more than six years after the accident.

The Commission denied Mr. Vigos's claim for failure to satisfy § 98 (2)'s six-year filing requirement. After the case came before the Utah Supreme Court, the Court issued three separate opinions:

- The plurality decision, written by Justice Stewart and joined by Justice Durham, held that § 98 (2)'s six-year filing requirement was satisfied if "required forms were filed, disability benefits paid, and medical expenses compensated before the six-year period ended." *Vigos* at 213. Because those steps had been taken in Mr. Vigos's case, Justice Steward and Justice Durham held that Mr. Vigos had met the filing requirement.
- Justice Russon issued a separate opinion concurring in the result reached by Justices Stewart and Durham, but for a different reason. Justice Russon concluded that Mountainland and its insurance carrier "are estopped from invoking [§ 98 (2)'s six-year filing requirement] because they have already granted disability benefits to Vigos without demanding compliance with the application requirement." *Vigos* at 216.
- The third decision, a dissent written by Chief Justice Howe and joined by Justice Zimmerman, would have strictly applied the six-year filing requirement as a bar to Mr. Vigos's claim.

The logic of either the plurality or concurring *Vigos* decisions compels the conclusion in this case that Mr. Henningson's claim for permanent total disability compensation is not barred by § 98 (2). Justice Stewart and Justice Durham's rationale is satisfied because required reports regarding Mr. Henningson's claim were timely filed, and medical, temporary total, and permanent partial benefits were paid before the six-year filing period ended. Justice Russon's rationale is satisfied because Sunnyside's voluntary payment of benefits to Mr. Henningson estops Sunnyside from now demanding compliance with § 98 (2). The Commission therefore concludes that Mr. Henningson's claim is not barred by § 98 (2) and the Commission has "original jurisdiction" jurisdiction over the claim. See *Vigos* at 215.

Continuing jurisdiction to award benefits. As discussed above, the Commission has

original jurisdiction over Mr. Henningson's workers' compensation claim. However, Sunnyside and the ERF argue that the Commission's jurisdiction does not extend so far as to allow an award of permanent total disability compensation to Mr. Henningson for an injury that has existed with no significant change since December 1994, the date he reached medical stability from his injury.

Section 78 (1) of the Utah Workers' Compensation Act provides that: "[t]he powers and jurisdiction of the commission over each case shall be continuing." In *Spencer v. Industrial Commission*, 733 P.2d 158 (Utah 1987), the Utah Supreme Court observed that "[t]he power of the [Labor] Commission to modify awards when 'in its opinion' modification is justified is not an arbitrary power, . . . but a power wedded to the duty to examine credible evidence. Under well-established principles of stare decisis, the basis of modification is provided by evidence of some significant change or new development in the claimant's injury **or proof of the previous award's inadequacy**." (Internal citations omitted; emphasis added.)

Sunnyside and the ERF argue that Mr. Henningson has not shown any change of circumstances to justify reopening his claim to award permanent total disability compensation. That argument overlooks the Commission's continuing jurisdiction to award benefits upon "proof of the previous award's inadequacy." *Spencer, ibid.* In this case, Mr. Henningson has been permanently and totally disabled since December 16, 1994. Although he received some compensation for temporary total and permanent partial disability, he never received the permanent total disability compensation to which he was entitled. Under the statutory provisions of the Act in effect at the time of Mr. Henningson's accident, the scope of the Commission's continuing jurisdiction is sufficient to reach and correct this inadequacy.

The Commission notes that the 1999 Utah Legislature amended the Utah Workers' Compensation Act to place a 12-year time limit on the Commission's continuing jurisdiction. See *Ortega v. Meadow Valley Construction*, 996 P.2d 1039, 1042 (Utah 2000). Such a legislative modification of the Commission's continuing jurisdiction would not seem to be necessary if Sunnyside and the ERF's arguments regarding the extent of such jurisdiction were correct. The Legislature's action in 1999 addresses many of the policy issues identified by Sunnyside and the ERF. However, neither Sunnyside nor the ERF argue that the 1999 amendment, enacted several years after Mr. Henningson's accident, can be applied to his claim.

Sunnyside and ERF liability for benefits. Section 69 of the Act establishes the conditions under which the ERF must share an employer/insurance carrier's liability for payment of benefits in cases of permanent total disability. The statute provides that, if a permanently and totally disabled worker had at least a 10% whole-person impairment prior to his or her work accident, then the employer/insurer is liable for the first $20,000 in medical expenses. After the employer/insurance carrier has paid that amount, additional medical expenses are divided equally between the ERF and the employer/insurer. Judge Hann's order mistakenly reverses this statutory formula by requiring the ERF to pay the initial $20,000 of Mr. Henningson's medical expenses. The Commission will modify

Judge Hann's order to correct that error.

Section 69 also provides that, in cases involving a preexisting 10% impairment, the employer/insurer is liable for the injured worker's first three years of permanent total disability compensation. Thereafter, the ERF is liable to pay continuing benefits. Because Mr. Henningson had at least a 10% impairment prior to his October 1993 accident, Sunnyside is only liable for the first three years Mr. Henningson's permanent total disability compensation. The Commission will modify Judge Hann's order accordingly.

Finally, in light of the Utah Supreme Court's decision in *Merrill v. Labor Commission et al.*, 227 P.3d 1099 (Utah 2009), the Commission will strike that part of Judge Hann's order that authorizes the ERF to offset Mr. Henningson's future social security retirement benefits against his on-going permanent total disability compensation.

ORDER

The Commission hereby modifies the terms of Judge Hann's order, found at pages five and six of her decision, as follows:

IT IS THEREFORE ORDERED that Sunnyside Coal Company and Workers Compensation Fund pay permanent total disability compensation to Cecil Henningson at the rate of $351 per week, commencing on December 16, 1994, and continuing for 156 weeks thereafter, until December 9, 1997. Sunnyside Coal Company and Workers Compensation Fund are entitled to a credit against this liability for their prior payments of permanent partial disability compensation totaling $6,8645. Sunnyside Coal Company and Workers Compensation Fund shall also pay interest to Cecil Henningson at 8% per annum on any unpaid disability compensation.

IT IS FURTHER ORDERED that the Employers' Reinsurance Fund shall pay permanent total disability compensation to Cecil Henningson at the rate of $351 per week or 36% of the current state average weekly wage rounded to the nearest dollar, whichever is higher. The Employers' Reinsurance Fund shall commence these payments as of December 9, 1997, and continue them until Mr. Henningson dies or until further order of the Commission. The Employers' Reinsurance Fund shall also pay interest to Cecil Henningson at 8% per annum on any accrued but unpaid disability compensation.

IT IS FURTHER ORDERED that the Employers' Reinsurance Fund deduct $12,250 from the amount otherwise payable to Cecil Henningson and pay this amount directly to Jeffrey Cottle as his fee for serving as Mr. Henningson's attorney in this matter.

IT IS FURTHER ORDERED that the Employers' Reinsurance Fund shall reimburse Sunnyside and Workers Compensation Fund for 50% of their payments of Mr. Henningson's medical expenses

that are in excess of a total of $20,000.

IT IS FURTHER ORDERED that Mr. Henningson shall be referred to Utah State Office of Rehabilitation for evaluation. The Employers' Reinsurance Fund shall pay to the Utah State Office of Rehabilitation an amount not to exceed $3,000.00 for use in Mr. Henningson's rehabilitation and training.

It is so ordered.

Dated this 27th day of December, 2010.

Sherrie Hayashi
Utah Labor Commissioner

NOTICE OF APPEAL RIGHTS

Any party may ask the Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Labor Commission within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order On Motion For Review in the matter of Cecil Henningson, Case No. 07-0253, was mailed first class postage prepaid this 27th day of December, 2010, to the following:

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Utah Labor Commission